Government of the District of Columbia

Office of the Attorney General

Testimony of
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Titles III (B) (Legal Service Amendments) and V (E) (Child Support Pass Through Establishment) of the FY 2006 Budget Support Act of 2005

Committee on the Whole
Linda W. Cropp, Chairman
Council of the District of Columbia

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John A. Wilson Building
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I. INTRODUCTION

Good afternoon, Chairman Cropp and members of the Committee. I am Robert Spagnoletti, Attorney General for the District of Columbia. It is my pleasure to appear before you today to discuss Titles III B and V E of Bill 16-200, the "Fiscal Year 2006 Budget Support Act of 2005." Title III B has the short title, the "Legal Service Amendment Act of 2005," while Title V E has the short title, the "Child Support Pass-Through Establishment Amendment Act of 2005."

On April 12, 2005 I appeared before the Council's Committee on the Judiciary to testify concerning the Fiscal Year 2006 budget requests for the Office of the Attorney General for the District of Columbia (OAG). During that testimony, I discussed the budgetary implications of these two proposals. I said the first proposal would create greater efficiency in the Legal Service by streamlining the chain-of-command for subordinate agency counsel and vastly improving the utilization and deployment of the District's legal resources. With respect to the second proposal, I discussed the potential direct and indirect costs of the pass-through and addressed the need for its delayed applicability. Let me turn here to the substance of the proposals and the reasons why the Council should approve them.

II. LEGAL SERVICE ACT AMENDMENTS

A. The Problem

As background, I should first mention that there are approximately 90 Legal Service attorneys in 23 subordinate agencies in the District government. These agencies are the: Alcoholic Beverage Regulation Administration, Child and Family Services Agency, Department of Consumer and Regulatory Affairs (DCRA), Department of Corrections, Department of Employment Services, Fire and Emergency Medical Services Department (FEMSD), Department of Health (DOH), Office of Human Rights, Department of Human Services, Department of Insurance, Securities and Banking, Department of Mental Health, Department of Motor Vehicles, Department of Public Works (DPW), District Department of Transportation (DDOT), Metropolitan Police Department, Office of Cable Television and Telecommunications, Office of Contracting and Procurement (OCP), Office of the Chief Technology Officer, State Education Office, D.C. Taxicab

Commission, D.C. Office of Personnel (DCOP), Department of Parks and Recreation, and the Office of the Chief Medical Examiner.

Prior to the January 22, 1999 effective date of the emergency version of the Legal Service Establishment Amendment Act of 1998 (Legal Service Act), District government attorneys working for subordinate agencies were independent of the authority of OAG – then the Corporation Counsel. Agency counsel were hired by, and answered to, only agency directors. Thus, a subordinate agency lawyer could give advice and take legal positions or actions that were contrary to the legal position established by OAG or those taken by other agencies. In addition, OAG often had great difficulty obtaining needed support from agency counsel in defending litigation that arose from agency activities.

The Legal Service Act placed subordinate agency counsel under the direction, supervision, and control of OAG effective on October 1, 1999 – almost six years ago. However, despite this change, the Legal Service continues to be bifurcated, with OAG having formal, but less practical, control. The continuing problems in this respect are illuminated in a comprehensive study of subordinate agency counsel completed by OAG earlier this year (hereafter, "OAG Study").

Information for the OAG Study was developed through a comprehensive 56-question survey form provided to subordinate agencies to assess the structure and legal needs of the agencies. The survey requested information on all aspects of agency counsel operations, including staffing, duties of lawyers, subject areas in which the lawyers must be knowledgeable, volume of work, and agency needs. The Deputy Attorney General for Agencies then met with each agency General Counsel to ensure that the survey was completed and that there was a common understanding of the questions being asked.

The six major findings from the OAG Study are:

- Agency counsel spend significant time performing non-legal functions such as providing advice on personnel matters. Most of the surveyed agencies stated that the time spent on non-lawyer functions ranged from a minimum amount to 40% of the attorneys' time. Further, attorneys indicated that they spend as much as 10% of their time on personnel matters (such as hiring, discipline, grievances, EEO matters

and terminations) that would more appropriately be handled by human resource staff. Agency counsel also reported that they spend substantial time on such matters as drafting testimony and attending non-legal meetings on behalf of their directors.

- Legal functions on particular projects/assignments are split among OAG and agency counsel resulting in significant inefficiency. For example, a contract for an agency's purchase of goods and/or services in excess of $1,000,000 may involve at least three, perhaps more, attorneys in three different offices. An attorney in OCP assists the purchasing agency's attorney with developing the contract terms, defining legally defensible contract parameters, implementing the contract, and conforming agency practice to the contract and statutory requirements. Thereafter, the contract is transmitted to the OAG Procurement Section for a legal sufficiency review, which often results in extensive re-drafts for technical and substantive reasons. In many situations, legal sufficiency reviews are requested although there has been no prior OAG involvement with the contract – despite its size or importance – notwithstanding the fact that there is a short turn-around time for completion.

  Waste caused by the bifurcation of duties between OAG and agency counsels is also demonstrated with respect to enforcement matters. Enforcement functions of attorneys are divided between OAG and the agencies, oftentimes with little meaningful distinction between the functions performed at the agency and those performed by OAG. For example, some DCRA attorneys are used for litigation and enforcement of various regulatory violations. The same work is performed by OAG's Civil Enforcement Section. Some DCRA cases are referred to OAG while others remain at DCRA. Those cases which remain at the DCRA are often handled in different ways, following different procedures, and sometimes producing different results.

- There are misallocations of funding and work in the subordinate agencies based on the FTEs made available for attorney positions. There is little, if any, relationship between the number of lawyers in an agency and the total number of agency employees. Also, there is little, if any, correlation between the total dollars spent and the FTEs associated with the agency or agency general counsel. In fact, each

agency calculates its "legal service" budget in a different manner, making it difficult to assess the per-lawyer cost per agency.

The following examples highlight these disparities:

1. FEMSD has a total of 2,036 FTEs, one attorney, and a legal service budget of $290,329;
2. DOH has a total of 522 FTEs, 17 attorneys, and a legal service budget of $1,400,010;
3. DPW has 1,276 total FTEs, with 2.5 attorneys and a legal service budget of $303,065;
4. DCRA has only 372 total FTEs, but has 10 attorneys with a legal service budget of $1,146,928; and
5. The Office of Property Management (OPM) has 66 total FTEs, zero attorneys, and no legal service budget.

When an agency has no available funds for legal services, or makes a policy decision not to fund an attorney position, or to de-fund an attorney position, OAG nevertheless has to support the agency's legal needs. For example, OPM, an agency with no attorneys, generates an enormous quantity of legal work relating to its real estate and contracting obligations, all of which is supported by OAG's Commercial Division. As another example, the absence of a general counsel in DCOP for the last several years has caused OAG and other subordinate agencies to duplicate efforts on legal issues relating to personnel matters.

- <u>There is a continuing lack of communication and coordination between OAG and agency counsel</u>. Agencies engage in projects or adopt polices that affect not only the implementing agency, but also OAG, the Executive Office of the Mayor, or other agencies without the necessary coordination or communication between the affected parties

  In addition, OAG spent nearly $2 million to develop and to install the centralized case management system, known as ProLaw, to track and manage the many matters handled by OAG. ProLaw provides OAG with the ability to identify new matters, attach e-mails and documents, and connect with Outlook to provide reminders of critical dates and meetings. ProLaw also enables OAG managers to keep track of case

intake and manage caseloads. However, the OAG Study revealed that no agency counsel office is connected to ProLaw. Further, because the purchase of a ProLaw license for agency counsel requires a discretionary expenditure of agency funds, OAG cannot mandate the agencies to connect to, or use, ProLaw. This lack of connectivity makes it difficult for agency lawyers to track their own matters (although a few agencies have stand-alone databases), and impossible for OAG to remain current on agency counsel workload and assignments.

- Certain functions, such as drafting legislation and rulemaking, should be centralized to ensure a consistent, high-quality work product. Currently, rulemaking occurs at the agency level and is reviewed by OAG for technical and legal sufficiency. In most cases, the rules are drafted long past the deadline and even then require several cycles of review, redrafting, and editing by OAG before they are finalized. This back and forth process is extremely time-consuming and redundant.

  The OAG Study showed that agency attorneys spend an average of 11.31% of their time engaged in drafting legislation and rulemaking. This time factor translates into approximately 9 to 10 subordinate agency attorneys. Direct supervision and control of the rulemaking and legislative process by OAG would not only eliminate the current time-consuming back and forth process between OAG and the agency counsel, but would also create a cadre of experts that would enhance the quality of these important, often complex, tasks.

- The existing disparity in pay and position titles contribute to low morale among agency lawyers and makes it difficult to attract and to retain talented attorneys for agency counsel positions. As you know, the Council recently approved pay resolutions, in accordance with an OAG/AFGE arbitration award, that increased the pay of attorneys employed by OAG. The pay increases create as much as a $15,000 to $20,000 annual salary gap between the pay of OAG attorneys and that of attorneys in subordinate agencies. In addition, the title of Assistant Attorney General, enjoyed by attorneys within OAG, is perceived by some as more prestigious than that of Attorney Advisor to an agency. The combined factors of the substantial disparity in pay and the perceived significance in titles between OAG and agency counsels

make agency counsel positions far less attractive to the type of well-qualified applicants that are sought to be hired and retained to perform the difficult and important legal tasks of the subordinate agencies. In one recent example, a finalist for the position of General Counsel to an agency declined the position, in large part, because the maximum salary that the agency could offer was far below the market rate. Although OAG may not have been able to exactly match the offer the candidate received from a private firm, OAG's salary and title would have made the position much more competitive.

The existing allocation of OAG lawyers to the Department of Housing and Community Development (DHCD) is an excellent example of how and why agency counsel should be part of OAG. Attorneys who are in OAG's Economic Development Section, Commercial Division, carry the title of Assistant Attorney General but are assigned to the DHCD. These attorneys are supervised by OAG, occupy OAG FTEs, and are paid on the OAG pay scale. They are connected to ProLaw and are fully incorporated into the Commercial Division, OAG. The DHCD Director has been so pleased with this arrangement that he has twice offered to give bonuses to these OAG attorneys out of his own agency's budget. It is important to note that the authors of the Legal Service Act viewed the type of arrangement described with OAG attorneys assigned to DHCD as the ultimate goal for an OAG-agency relationship.

To summarize, the OAG Study demonstrates that while the Attorney General has control over the legal policy and positions taken by subordinate agency lawyers, there is no direct day-to-day management or financial control over these attorneys. Thus, the Legal Service Act has, unfortunately, perpetuated a bifurcated legal service, where OAG has formal, but less practical, control over the work assignments and resource allocation of agency counsels. Any one agency continues to affect the overall allocation of legal resources by choosing to fund, not fund, or de-fund, any particular legal service position; and by setting priorities for attorneys. Thus, while the Legal Service Act was a major advance toward a unified cadre of District government lawyers, it is not enough.

B. **The Proposed Solution**

Enactment and implementation of the "Legal Service Amendment Act of 2005" ("the Bill") will permit OAG and the subordinate agencies to remedy the problems identified in the OAG Study and thus create the ideal legal representation scenario that will most efficiently serve the needs of the District of Columbia. Let me briefly describe the Bill's main provisions.

Section 3012 of the Bill contains the amendments to Title VIII-B of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, which is the current Legal Service Act. Section 3012 (b) and (h) of the Bill provides for all attorneys who perform work for the subordinate agencies to become employees of OAG, effective October 1, 2005. Pursuant to section 3012 (d) of the Bill, the Attorney General would have general personnel authority (including hiring, promotion, and discipline) over these attorneys. Section 3012 (e) provides that a Senior Executive Attorney who is employed by OAG but who performs work primarily for another subordinate agency, whether denominated a General Counsel (or the equivalent), and whether physically located at the agency or not, would serve at the pleasure of the Attorney General. These new provisions would permit the Attorney General to make personnel decisions (hiring, promotion, termination) regarding line and Senior Executive Attorneys, but still require the Attorney General to consult with the agency head before making any final decisions. The Attorney General would, in his or her discretion, still be authorized to delegate the direction and control of any Legal Service attorney in a subordinate agency to the agency head pursuant to other provisions of the Legal Service Act.

At the time the Bill was written, the proposed 2006 Legal Service budgets for the subordinate agencies had already been prepared and it would have been logistically difficult, if not impossible, to revise them before the Mayor's proposed budget was submitted to the Council. Therefore, section 3013 of the Bill provides that until the Legal Service budgets of the subordinate agencies are transferred to the budget of OAG the subordinate agencies that employed the attorneys who are transferred to the employment of OAG would continue to be responsible for their compensation. To carry out the Bill's purposes, section 3015 would give the Attorney General the management of the Legal Service budgets of the other subordinate agencies in Fiscal Year 2006 and thereafter, to the extent those budgets had not yet been included in OAG's budget.

Section 3014 of the Bill contains the customary transfer provisions. Finally, section 3016 contains miscellaneous conforming amendments relating to the General Counsel of the Department of Mental Health.

Although I am recommending the transfer of budget and FTE authority for legal matters from the other subordinate agencies to OAG, I do not anticipate that every attorney will physically leave his or her current location. Indeed, I expect that each agency would continue to have an attorney who performs the functions of the agency's current General Counsel (or the equivalent) and who – along with necessary line attorneys and support staff – is located in the agency and available to the agency director and his or her staff.

I strongly urge the Council to approve this important proposal. Passage of the Bill will address the problems identified in the OAG Study, improve the efficiency and deployment of the District government's legal resources, and complete the restructuring envisioned in the original Legal Service Act.

III. CHILD SUPPORT PASS-THROUGH

The "Child Support Pass-Through Establishment Amendment Act of 2005" is an important step in the District's efforts to assist needy children and families. This legislation, which Councilmember Patterson originally introduced in 2004, would reinstate the $50 per month pass-through and disregard of child support paid to families receiving Temporary Assistance to Needy Families (TANF) formerly required under federal law. As you know, the District discontinued the pass-through and disregard following the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), approved August 22, 1996 (Pub. L. 104-193; 110 Stat. 2105), which eliminated this federal requirement.

Prior to 1996, child support agencies were required to distribute to a family receiving TANF the first $50 in current support that the non-custodial parent paid each month. This $50 "pass-through" was an exception to the general rule that allowed the states to (1) retain a designated portion of the child support paid on cases involving families receiving TANF and (2) forward the balance of the collection to the federal government as reimbursement for past welfare expenditures. The TANF agency disregarded this payment in determining the family's eligibility for assistance. After PRWORA, states

were no longer required to pass through and disregard the first $50.00 in child support collected, but they were allowed to continue these practices if they chose to do so under local law.

Following PRWORA, many states, including the District, eliminated or modified the $50.00 pass-through and disregard, based at least in part on the cost of paying this money to families.[1] Under prior law, the pass-through's cost to the state amounted to the state's local share of the payment, which it would have otherwise retained but for the pass-through. The federal government participated in the cost of the pass-through by not requiring the states to provide reimbursement for the federal share. In eliminating the pass-through and disregard requirements, however, PRWORA also eliminated this federal participation, and states that have continued the pass-through are absorbing its full cost. These states must forego the retention of the local portion and transfer the federal share to the federal government out of local funds.

Although the District eliminated the $50.00 pass-through and disregard following PRWORA based on its increased cost, I support its reinstatement. As a matter of policy, I believe that it is in the best interests of District children for families receiving TANF to have access to these additional funds. Research has also revealed that families realize substantial additional benefits from the pass-through that go beyond the receipt of more money. For example, findings from a Wisconsin demonstration project that implemented a full pass-through and disregard of all child support collected and that analyzed traditional pass-through and disregard policies found a positive relationship between the amount of the pass-through and the number of non-custodial parents paying support. This study further determined that a positive relationship exists between the pass-through and the rate of paternity establishment.[2] These findings suggest that the pass-

[1] According to a report prepared by the Urban Institute, by July of 1999, only 17 states continued to pass through the first $50.00 per month, with other states adopting a variety of approaches to the pass-through and disregard of collections in TANF cases. See Fender, Lynne, Signe, Mary McKernan, and Bernstein, Jen, *Linking State TANF and Related Policies to Outcomes: Preliminary Typology and Analysis, Final Report*, The Urban Institute, Washington, D.C., 2002.

[2] Meyer, Daniel R. and Cancian, Maria, *W-2 Child Support Demonstration Evaluation Report on Nonexperimental Analyses*, Vol. I, University of Wisconsin, Institute for Research on Poverty, Madison, Wisconsin, 2001. Preliminary findings from a demonstration project in Vermont also support the conclusion that the pass-through contributes to greater financial involvement by non-custodial parents. Bloom, et al., *WRP Implementation and Early Impacts of Vermont's Welfare Restructuring Project,* MRDC, 1998.

through encourages non-custodial parents to stay involved with their families and to develop a more consistent pattern of family support. Congress has also recognized the value of the pass-through and disregard to families. Pending federal TANF reauthorization legislation contains provisions waiving collection of the federal share of certain support payments passed through and disregarded in TANF cases.[3] In my view, providing more income, in the form of child support, to children struggling to emerge from poverty is simply the right thing to do.

When OAG testified before the Committee on Human Services in support of the pass-through in May 2004, we expressed concern about the impact the legislation would have had on the Child Support Services Division's (CSSD's) ability to implement the pass-through and accomplish its other critical objectives in the absence of additional funding. These concerns will be alleviated if the Council approves the community investment initiatives that are included in OAG's proposed Fiscal Year 2006 budget. When the Office of the Chief Financial Officer (OCFO) reviewed this legislation last year, costs for the pass-through were projected to be $1,474,500, which included the funds to be distributed to TANF families, payments to the federal government for its share of TANF collections, lost federal matching funds, and the costs associated with reprogramming CSSD's automated system to support implementation. This estimate was based on an analysis of the amount that the pass-through would have cost for Fiscal Year 2005, if no local funds were added to CSSD's budget and child support payments to TANF families remained constant at the level experienced in Fiscal Year 2003.

Although the amount of the budget request reflects the fiscal impact that the pass-through would have had if it had been enacted in Fiscal Year 2005, the cost of the pass-through will depend on the circumstances that actually exist at the time of implementation. If funds are included in the budget to support the pass-through, the District will not experience the loss in federal reimbursements anticipated in Fiscal Year 2005 when the Council was originally considering this legislation. But, the cost of the pass-through could increase depending on the characteristics of CSSD's TANF case load in Fiscal Year 2006. We anticipate that improvements in the effectiveness of the child support program will result in an increased number of TANF

[3] H.R. 240, the "Personal Responsibility, Work, and Family Promotion Act of 2005" was introduced on January 5, 2005. Its pass-through provisions are substantially similar to House and Senate versions of the bill that were before the 108th Congress.

cases with support orders and in increased collections for families receiving TANF. As collections in TANF cases increase, the amount needed to support the pass-through will increase as well. While these increased costs might be offset by increases in the local share of TANF collections CSSD receives in excess of the pass-through, these amounts are necessarily somewhat speculative, and are unlikely to match the projections made based on data from Fiscal Year 2003.

Although we are confident that the amount of the Fiscal Year 2006 budget request for OAG associated with the proposed $50.00 per month pass-through will support its implementation in Fiscal Year 2006, it is not clear that this amount would be sufficient to increase the pass-through to $100.00 per month, as was suggested by the Legal Aid Society in its testimony on April 12, 2005. We are in the process of updating our cost projections for Fiscal Year 2006, and will ask the Office of the Chief Financial Officer to provide the Committee with the results of this review before the Council votes on this bill.

Including funding for the pass-through in the Fiscal Year 2006 budget is an important step in the successful implementation of this legislation, and I support the Council's efforts to provide this assistance to needy families. However, given that CSSD is already using its limited resources to make many other needed improvements to the child support program, the applicability of the bill should be contingent on the availability of appropriations. In addition, it is crucial that the applicability of the legislation be deferred until at least six months after enactment to ensure that CSSD has sufficient time to implement. CSSD's information technology contractor will require a significant amount of design and programming time to make necessary changes to CSSD's automated system, and CSSD must obtain federal approval for these changes in order to receive federal reimbursement of their costs. In addition, the new programming will have to be completed while major revisions to the system's performance reporting software are underway in accordance with new federal requirements. A delayed applicability provision must therefore be added to ensure that TANF families will be able to receive their payments as soon as the pass-through takes effect.

Thank you for allowing me to appear before you today. I am happy to answer your questions.